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## Religious Liberty and Cultural and Ethnic Pluralism in the Colombian Constitution of 1991

*Viviane A. Morales Hoyos\**

### I. INTRODUCTION

This paper reflects upon the conflicts that have arisen between the fundamental right of religious liberty and the right to ethnic and cultural pluralism, both of which are recognized in the Political Constitution of Colombia of 1991.<sup>1</sup> Part II of this piece discusses the development of the fundamental right of religious liberty. Part III highlights the rights of indigenous peoples recognized in the new Constitution. Part IV addresses the conflicts between religious liberty and the rights of cultural or ethnic minorities. This paper concludes that by resorting to the Constitutional Court these two fundamental rights can potentially be harmonized. However, where harmonization is unsuccessful, the preservation of cultural and ethnic identity should trump the fundamental right to religious liberty.

### II. RELIGIOUS LIBERTY IN COLOMBIA

#### *A. Religious Liberty Prior to 1991*

Religious liberty has achieved its full dimension in Colombia only since 1991. For centuries, the subject of religion has been marked by intolerance. With respect to religious matters, the nation was characterized by confessionality. This fact has been

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1. CONSTITUCIÓN POLÍTICA DE COLOMBIA (Colom.). The constitutional provisions and other legal texts in this article were translated by Yvette Diaz and the BYU Law Review in consultation with the author. For another translation of the Colombian Constitution, see IV CONSTITUTIONS OF THE COUNTRIES OF THE WORLD (Gisbert H. Flanz ed., Peter B. Heller & Marcia W. Coward trans., 1995).

## 562 BRIGHAM YOUNG UNIVERSITY LAW REVIEW [1999]

demonstrated by important and decisive historical events that have influenced the ideological foundations and doctrines of the political parties in various generations, including the current one. With limited exceptions, the political Constitutions, which the nation has known since its independence, established the undisputed religion of the majority—Catholicism—as the official religion. This had the effect of discounting other religious groups and denying these groups the possibility of vindicating their basic rights.

The Constitution of 1886, which governed the nation for over one hundred years, recognized the Catholic church as the official religion of the Colombian nation, although it did guarantee liberty to all sects as long as they did not contradict Christian morals or the law. The State established agreements, or Concordats, with the Holy See which governed the relationship between the State and the Church. Under the Concordats only the Catholic Church was granted privileges in matters such as the civil status of persons, the evangelization of indigenous territories, and the financial contribution of the state to social, and above all, educational works.

From the last decade of the nineteenth century until the late 1950s, the Catholic Church exercised such a vast monopoly in the Colombian culture that it could be regarded as a cultural dictator. The Concordat mandated the teaching of religion in schools, colleges, and universities, most of which were Catholic. The Catholic Church's control was even more important in the area of family law. Until 1975, no other marital union existed except the Catholic, and it was not until 1993 that the full power of the State to regulate all aspects of civil marriage was recognized. The establishment of confessionality in the nation encouraged a high degree of intolerance in religious matters. This and other factors converged to restrict Colombian democracy, creating tensions that became a fountain for diverse forms of violence.

*B. Religious Liberty in the Constitution of 1991*

Colombia found itself within this rather anachronic frame in 1991, a year which undoubtedly signified, from the point of view of the constitutional structure, a true Copernican revolution. In a context of indiscriminate violence and debilitation of the state, a Constitutional Assembly was

convened for the purpose of drafting a new constitution. The Assembly involved sectors which had previously been excluded from important political decisions. The involvement of such diverse interests in the search for peace promoted the establishment of a new constitution which, for the first time, would adequately assure the existence of fundamental rights for all citizens.

All minority sectors that participated left their mark on this Constitution. The indigenous population wished to vindicate the right to ethnic autonomy. The artists sought to establish the right to culture as a fundamental right. The Evangelical Christians, the largest religious denomination next to the Catholic, demanded the just and necessary end to all discriminatory treatment against those not professing the majority religion. With these concerns in mind, the Assembly introduced Article 19, which states: "Freedom of religion is guaranteed. All persons have the right to freely profess their religion, and to disseminate it in individual or collective form. All religious confessions and churches are equally free before the law."<sup>2</sup>

The text of Article 19 of the new Constitution considerably amplified the content of religious liberty. In effect, it not only established tolerance for the exercise of non-Catholic religions (which had been established in the Constitution of 1886), but it also clearly recognized religious liberty as a fundamental right.

Naturally, the delegates to the National Constitutional Assembly of 1991 took into account the democratic and pluralistic understanding that, in our time, religious activities extend to almost all aspects of life and that most, if not all, associations in a state will assert their claims for protection, tutelage, and judicial guarantees of equality and liberty.

In this manner, the new Constitution rejected recognition of the Catholic religion as a judicial-political option and adopted pluralism, or religious liberty, as the principle of social organization and civil configuration. The Constitution did not, however, establish a position of neutrality with respect to religious liberty. Rather, it established religious liberty as the norm which protects and promotes religion as a personal and

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2. CONSTITUCIÓN POLÍTICA DE COLOMBIA art. 19 (Colom.).

## 564 BRIGHAM YOUNG UNIVERSITY LAW REVIEW [1999

social good, and assures, by virtue of the law and its specific judicial instruments, the validity of individual religious belief.

This commitment to new values embodied in the Constitution of 1991 engendered somewhat conflicting attitudes in the legislature and courts.

*C. Legislative Development in Religious Liberty Since 1991*

Within the current regime of Colombian public law, there exist certain laws of special character which appear as an extension of the constitutional regime. These laws have, among other things, developed human rights. Law 133 of 1994, which I authored, is one of these special statutes; it is the only law since the 1991 Constitution that has concerned itself with fundamental rights.<sup>3</sup> Law 133 is based on the assumption that Colombia went from being a “confessional” state to being a “secular” state; “secular” by definition implies neutrality, impartiality, and no positive or negative valuation of religion.

This law concerns itself extensively with extending religious liberty, establishing a common order for all religions and sects, and fixing a basic judicial framework for the various religions and religious confessions. This judicial framework guarantees that all persons, as individuals or communities of believers, can develop their religious activities freely, in an organized or spontaneous manner. The law also serves as a frame of reference for the regulation of various acts, functions, and responsibilities of the public administration, in relation to churches and religious confessions, principally in the matter of recognizing the personal and special relation between the churches, confessions, and religious denominations and the state. It further compels judicial recognition of the autonomy of churches and religious confessions.

Since religion is not merely subjective, it needs legal protection in the positive area of judicial autonomy as well as in the negative area known as immunity of co-action. The law thus establishes that no one can be (1) obligated to act against one’s religious creed, (2) impeded, within the proper limits of this right, from acting in conformance with one’s beliefs, or (3) persecuted due to one’s beliefs. Each has the right to live

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3. Law 133 of 1994 (Colom.).

according to one's creed. These rights have constitutional foundation in Articles 15, 16, 18, 19, 20, 42, and 68 of the National Constitution.

Law 133 also regulates the liberty of sects, but only as it ties into religious liberty which comprehends a larger scope. Not only does the law concern itself with the subject of sects, the celebration of rites and practices, and the profession of a religion, but also with the judicial personality of churches and confessions, the value of their rights relating to the civil status of persons, the scope and limits of the decisions of their internal bodies, the practices and teachings of churches, the conditions necessary to accredit the professional competence of their authorities, and the relations of each with the civil state. In Law 133, the cult of faith, in its various expressions, finds ample liberty for its existence and development. The law attempts to ensure that religious liberty guarantees the right of individuals to organize legal entities which project themselves in the orders that have been mentioned. Therefore, the statute<sup>4</sup> does not limit itself only to matters of belief, profession, or diffusion of individual or collective sects; it also addresses the organized existence of churches and religious confessions as judicial persons with the capacity to produce legal effects in the normative,<sup>5</sup> fiscal, and civil public law.<sup>6</sup> The law also promotes cooperation of persons with these churches with respect to determined manifestations of liberty.

In this manner the legislature also emphasized the necessity of expressly establishing, outside the traditional and general regime of judicial persons, a judicial framework of religious liberty which would recognize in detail the phenomenon of the existence of religious entities, with elements different from other associations recognized under public law. It is therefore evident that the will of the legislature was to address the judicial regulation of religious liberty—as a normative element of constitutional rank—to assure the coexistence, equality, liberty, pluralism, human dignity, and

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4. *See id.*

5. The term *normativo* in Colombian jurisprudence refers to regulations and general decrees that are obligatory to everyone.

6. The terms *civiles*, *subjetivos*, *de crédito*, and *reales* in Colombian jurisprudence refer to the cultural and social rights the individual has against encroachment by the government.

## 566 BRIGHAM YOUNG UNIVERSITY LAW REVIEW [1999]

beliefs of all persons who reside in the nation and to protect the freedom of sects and religion of all persons.

*D. Judicial Developments in Religious Liberty Since 1991*

Sharing the pluralistic and innovative spirit of the Constitution—in fulfillment of their function of Constitutional control through their pronouncements—the Justices of the Constitutional Court, established in Colombia in 1991, have introduced a profound change in the orientation of the Colombian establishment which had been traditionally characterized by its tendency to benefit the Catholic church and ignore the rights of religious minorities.

*1. Decision No. C-088 of 1994<sup>7</sup>*

Decision No. C-088/94 exemplified the profound change brought about by the Constitutional Court in light of the Constitution of 1991. In this decision, the court specified the scope of the fundamental right of religious liberty to ensure its effective application. In so doing, the court stated that religious liberty “is one of those rights that is indispensable, and that, under no circumstances, can it be ignored by public entities, since it projects itself to all dimensions of relations.”<sup>8</sup> This implies the acknowledgment of religious liberty as an inherent human right which is irrevocable, inalienable, and non-negotiable.

*2. Decision No. C-027 of 1993<sup>9</sup>*

Similarly, in Decision No. C-027/93, the court declared unconstitutional various articles in the Concordat with the Holy See because they limited the fundamental right of religious liberty, by failing to recognize the ideological, cultural, political, and religious pluralism existing in Colombia.<sup>10</sup> The Concordat, the court noted, did not recognize a great number of international human rights norms in matters such as (1)

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7. Constitutional Court Decision No. C-088 (1994).

8. *Id.*

9. Constitutional Court Decision No. C-027 (1993) (analyzing the validity of the Concordat).

10. *See id.*

religious liberty; (2) equality of rights with respect to marriage (both during the marriage and in dissolution); (3) freedom to teach; (4) the autonomy, rights, and liberties of indigenous peoples; and (5) the right of military personnel to receive religious assistance according to their beliefs. The Concordat was also problematic in that it granted aid to educational centers of the Catholic Church.

3. *Decision No. C-350 of 1994*<sup>11</sup>

In this decision the Constitutional Court declared Law 33 of 1927 to be unconstitutional, specifically invalidating the official dedication of Colombia to the Sacred Heart of Jesus.<sup>12</sup> Although the court recognized the importance of the Sacred Heart of Jesus, it stated that the “most extensive character of a particular religion does not imply that it can receive privileged treatment from the state; therefore, the Constitution of 1991 has conferred equal juridical value on all religious confessions, independent of the number of believers it has.”<sup>13</sup>

The constitutionality of the official establishment of Colombia to the Sacred Heart was plausible under the prior Constitution, which established the Catholic religion as the official religion of the nation and recognized it as an essential element of the social order. But the formerly official establishment of the Sacred Heart threatened the new constitutional order that established a secular and pluralistic state, founded on the recognition of full religious liberty and equality among all religious confessions. An official consecration by which the state manifests a preference in religious matters is unconstitutional since it violates the equality among the various religions established by the Constitution. This discrimination against the other religious creeds is even clearer when one considers that the consecration is effectuated through the President of the Republic, who, according to Article 188 of the Constitution, is the symbol of

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11. Constitutional Court Decision No. C-350 (1994) (analyzing the constitutionality of Law 33 of 1927 and Law 1 of 1952, which consecrated the Republic of Colombia to the Sacred Heart of Jesus).

12. Note that Law 1 of 1952 ratified Law 33 of 1927. The importance the people of Colombia ascribe to the Sacred Heart of Jesus is equivalent to the importance the people of Mexico give to the Virgin of Guadalupe.

13. Constitutional Court Decision No. C-350 (1994).



## 568 BRIGHAM YOUNG UNIVERSITY LAW REVIEW [1999

national unity. This official consecration also fails to recognize the separation of church and state.

4. *Decision No. C-511 of 1994*<sup>14</sup>

Jurisprudence has also begun to establish limits with respect to the exercise of religious liberty on matters such as conscientious objection, which is one of the manifestations of freedom of conscience, related to other fundamental rights such as peace. In Decision No. C-511/94, the Constitutional Court declared that “the Political Constitution imposes on Colombians general and specific obligations in relation to public force, and that generally, within the obligations of the person and citizen are found those of respecting and supporting the democratic authorities legitimately constituted to maintain national independence and integrity.”<sup>15</sup>

The decisions of the Constitutional Court that have developed the theme of conscientious objection merit concrete recognition. As a general rule, all Columbians are required by law to perform military service.<sup>16</sup> Exceptions are listed by statute but do not include conscientious objection. The right to freedom of conscience does not necessarily include the positive establishment of a right to conscientious objection to obligatory military service. In this manner, the Constitutional Court establishes limits on the exercise of religious liberty; but these limits are subject to the following three postulates: (1) the presumption must always be in favor of liberty in its maximum level, (2) the liberty to manifest one’s religion or conviction may not be the object of more restrictions than those foreseen by the law, and (3) the possible restrictions must be established by the law, and must not be arbitrary or discretionary, as corresponds to a true State of Law.<sup>17</sup>

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14. Constitutional Court Decision No. C-511 (1994) (analyzing the constitutionality of Law 48 of 1993).

15. *Id.*

16. See Law 48 of 1993; Official Decree No. 2048 of 1993; see also Constitutional Court Decision No. C-511 (1994) (analyzing mandatory military service).

17. See Constitutional Court Decision No. C-088 (1994) (analyzing Law 133 of 1994).

### III. THE CONSTITUTION OF 1991 AND ETHNIC AND CULTURAL PLURALISM

At the same time that it establishes an ample catalog of fundamental rights, the Constitution of 1991 recognizes the multiethnic nature of the Colombian nation by adopting the principle of respect towards cultural and ethnic diversity. In this setting, the Colombian state has admitted the importance and the immediate necessity of recognizing and guaranteeing the existence of culturally diverse communities as an essential element of their conservation. Thus, the State permits individuals and groups, in the words of the Constitutional Court, "to define their identity, not as citizens in the abstract sense of belonging to a territorial society and governing state, but an identity based on concrete ethnic and cultural values."<sup>18</sup>

The constitutional provisions recognize the rights of indigenous peoples. Indigenous territories are governed by councils composed and regulated according to the usage and customs of their communities; these enjoy autonomy in the management of their interests. According to the mandate of Article 68, members of ethnic groups shall "have the right to schooling that respects and develops their own cultural identity."<sup>19</sup> The authorities of indigenous peoples are allowed to exercise jurisdictional functions within their territory in accordance with their own norms and procedures, as long as they are not contrary to the Constitution and the laws of the republic.<sup>20</sup> To integrate the Senate of the Republic, an additional two senators were elected in a special national vote by indigenous communities.<sup>21</sup> The state also recognizes and protects the ethnic and cultural diversity of the Colombian nation.<sup>22</sup> Additionally, while the Constitution recognizes Spanish as the official language of Colombia, it also recognizes the languages and dialects of indigenous groups as official languages in their territories.<sup>23</sup> Similarly, instruction in

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18. Constitutional Court Decision No. T-342 (1994).

19. CONSTITUCIÓN POLÍTICA DE COLOMBIA art. 68 (Colom.).

20. *See id.* art. 246.

21. *See id.* art. 171.

22. *See id.* art. 7.

23. *See id.* art. 10.

## 570 BRIGHAM YOUNG UNIVERSITY LAW REVIEW [1999

communities with their own linguistic traditions will be bilingual.<sup>24</sup>

These provisions, which are without precedent in Columbian constitutional history, guarantee the autonomy of, and respect for, indigenous communities. Any interference in their customs, cultural values, or autonomy becomes a violation of these constitutional rights.

#### IV. CONFLICT BETWEEN THE RIGHT TO RELIGIOUS LIBERTY AND THE RIGHT TO CULTURAL AND ETHNIC DIVERSITY

By confirming the recognition of the cultural and ethnic diversity of the Colombian nation, the Constitution of 1991 continues to guarantee indigenous people and other diverse communities the rights granted to other citizens, and thereby prohibits any form of discrimination against them. Respect for cultural and ethnic diversity implies the coexistence, in the same normative document, of two complementary yet distinct realities—the rights of individuals and the rights of groups to be different. This coexistence may create a point of tension when, for example, the right to religious liberty and the right of cultural and ethnic identity conflict with each other. Several cases involving conflicts between these rights have had to be resolved by both the Constitutional Court and by ordinary judges.

##### *A. Conflict Between State-Endorsed Catholic Preferences and the Rights of Cultural and Ethnic Minorities*

A constitutional challenge was brought against an article in the 1974 Concordat between the Catholic church and the Colombian state.<sup>25</sup> The article granted special permission to the Roman Catholic Church to form a Permanent Commission (composed of the Prelate of the Episcopal Conference and public officials of the national government) to develop and oversee the progressive human and social development of indigenous peoples. The article was claimed to be unconstitutional because it violated the constitutional rights of ethnic minorities and their communities as recognized in the Constitution of 1991.

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24. *See id.*

25. *See* Constitutional Court Decision No. C-027 (1993).

## 561] RELIGIOUS LIBERTY IN COLOMBIA 571

Specifically, the Constitution protected the right to self determination, in other words, the right to autonomy. Additionally, it was alleged that the article did not recognize cultural and ethnic diversity, nor the inherent rights of indigenous communities.

The court declared this article unconstitutional, considering that

in the face of such categorical ordinances of the new

Constitution in favor of indigenous peoples, one cannot adjust the postulates of Article VI, which prescribes that the same be susceptible to a special canonic regime, and does not conform to the liberty of sects, which allows all persons the free profession of their religion and places all religious confessions on equal footing of liberty before the law.<sup>26</sup>

### *B. Other Conflicts*

Other conflicts have arisen between evangelical religions and indigenous communities regarding the conversion of members of these communities to these religions. As a first premise, one must understand that within the political, social, cultural, and economic context of the nation, there are two groups that are considered minorities: evangelicals and indigenous peoples. When the rights of both of these minority groups conflict, constitutional norms become unclear.

#### *1. Court Decision No. T-342 of 1994*

For example, in one case, thirty-two members of an Arhuaca indigenous community who had converted to an Evangelical church sought protection from the indigenous community to which they belonged because they were being subjected to ill treatment, attacks, dislodging, stripping of biblical texts, and closure of their temple by indigenous authorities. The indigenous council, the authority recognized by the state for indigenous protection, ultimately detained five indigenous evangelical members for a week. The thirty-two members sought a judicial order protecting their religious liberty and granting their pastor free access to indigenous territory.

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26. *Id.*

## 572 BRIGHAM YOUNG UNIVERSITY LAW REVIEW [1999]

The indigenous authorities claimed that they were allowed to prohibit the presence of evangelical pastors because they were threatening the traditional Mamo religion and indigenous culture by prohibiting their members from participating in “poporo,” “ayo,” traditional marriage ceremonies, funeral ceremonies, and traditional “aseguranzas.”<sup>27</sup> In other words, the presence of the pastor was disrupting their cultural homogeneity and destroying their religious tradition to the point that the indigenous community was being confronted and divided between traditionalists and evangelicals.

The judge of the Superior Tribunal of the Judicial District of Valledupar, following the precedent of the Constitutional Court, noted that “the culture of indigenous communities corresponds to a way of life that condenses in a particular manner of being and acting in the world, constituted in part by values, beliefs, attitudes and knowledge, which if it were canceled or suppressed, and this may occur, the environment would suffer severe deterioration which would induce its disestablishment and eventually extinction.”<sup>28</sup>

If it is clear that religious liberty is a fundamental right, it is no less clear that the right of ethnic and cultural diversity recognized in the Constitution of the Colombian nation<sup>29</sup> is a fundamental principle espoused in the jurisprudence of the Columbian republic. Columbia, having an eminently democratic, participatory, and pluralistic character, thus grants indigenous communities the fundamental right to ethnic, cultural, and social integrity. This right must be protected by a constitutional judge when she determines, by virtue of an analysis of the stipulated facts, that the right requires an act of guardianship.

When fundamental constitutional rights are at risk, those that protect racial and communal unity must prevail. Even

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27. These terms are proper expressions of indigenous languages of Colombia. *Poporo* is a cylindrical bowl in which indigenous peoples mix crushed coca leaves with ash to form a sacred mixture used in ceremonies and religious rites. *Ayo* is a spiritual guardian of children, women, and the elderly. *Aseguranzas* are portable objects made from thread woven from roots or from wool. They come in various colors and patterns and are the tangible representations of agreements, pacts, and covenants between the gods of the indigenous peoples and mortals.

28. Court Decision No. T-342 (1994).

29. CONSTITUCIÓN POLÍTICA DE COLOMBIA art. 7 (Colom.).

more, these rights enjoy the special protection of the state if they are founded on the respect and development of cultural identity and autonomy of indigenous communities, which are not only allowed the exercise of jurisdictional functions, but also the exercise of substantive and procedural norms.

Granting a pastor free access to indigenous territories for the purpose of performing religious practices different from traditional ones would ignore the free autonomy of indigenous communities. It is possible that indigenous communities could change their religion in conformity with their own regulations and convictions, but this should occur of their own initiative. Such changes should not be engineered by persons who are not aware of the traditional conscience of indigenous peoples, and who, while pretending to change their “primitive status,” end up destroying their beliefs and faith, or even worse, creating conflicts due to presentation of principles that contradict their religious identification.

Religious freedom is recognized when it is exercised by any individual indigenous person in places outside the indigenous community; this implies a respect for the traditional order and the collective property of the community. In other words, although the ability of an individual to change religion is guaranteed, it is accompanied by the obligation to realize the new religious practices outside the territory of his former religious community in order to protect and respect the cultural identity and integrity of that community.

## 2. *Constitutional Court Decision No. T-257 of 1993*

Through Decision No. T-257/93, the Constitutional Court resolved an action brought by an Evangelical Association, denominated New Tribes of Colombia, which appealed the denial by the Administrative Department of Civil Aeronautics and the Division of Indigenous Affairs of the Ministry of Government, of a request to obtain a definitive permit for the operation of an *aeródromo* in Yapima.<sup>30</sup>

The Association of New Evangelical Tribes of Colombia (hereinafter “Association”) has had as its purpose the

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30. An “*aeródromo*” is an airstrip. This specific case deals with the installations needed to land small planes, such as for the military.

## 574 BRIGHAM YOUNG UNIVERSITY LAW REVIEW [1999

promulgation and diffusion of the evangelical gospel among indigenous tribes since 1967. In order to accommodate the Association's purpose, the government has granted the necessary permits to proselyte in indigenous territories. In response to a request by the Association, the Chief of the Judicial Office of Civil Aeronautics argued that under the Constitution of 1991, the right of circulation was limited by private property rights. According to the INCORA Resolution,<sup>31</sup> the portion of the territory to be occupied by the Yapima airstrip was indigenous land. Therefore, under the Constitution of 1991, the Association was required to obtain the permission of the Yapima community to obtain the operation permit. The Association argued that the denial of the permit violated principles of judicial equality and resulted in discrimination based on nationality and religion by restricting the right to disseminate religion, the right of petition, and the right of free circulation through the national territory.

The Constitutional Court first considered that a piece of indigenous land is not a territorial entity but rather a form of collective property. The basis for treating indigenous land as collective property developed from various articles of Covenant Number 169 of the International Labor Organization, to which Colombia is a signatory. Covenant Number 169 gave indigenous peoples the right to participate in the management and conservation of the natural resources in their lands.<sup>32</sup> Therefore, the new Constitution confirmed the right of private property of indigenous peoples over their lands.

The Court noted that the political and judicial autonomy granted to indigenous communities by the Constitution needed to be exercised within the strict parameters established by constitutional text and in accordance with the communities' usage and customs, as long as they did not contradict the Constitution or the law, and in a form that ensures national unity. From this, the Court concluded that the denial of the definitive permit for the operation of the Yapima airstrip did

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31. Colombian Institute for Agrarian Reform.

32. See International Labor Organization (I.L.O.), no. 169, art. 15.

## 561] RELIGIOUS LIBERTY IN COLOMBIA 575

not harm or threaten the fundamental rights of circulation,<sup>33</sup> equality,<sup>34</sup> or religious liberty<sup>35</sup> of the Association.

3. *Constitutional Court Decision No. T-342 of 1994*

The Constitutional Court came to a similar conclusion in Decision No. T-342/94.<sup>36</sup> In this decision, two citizens, acting as agents of the indigenous community of “Nukak-Maku,” requested that their right of cultural and ethnic diversity, established and recognized in the Constitution, receive protection and that the court order the Association to leave the “Laguna Pabon,” in the Territory of Guavire, and cease the religious activities they had developed within that community.

To show that the activities developed by the Association of New Tribes of Colombia in the referred place created an irregular situation and violated the fundamental rights of the “Nukak-Maku,” the petitioners presented as facts and considerations the following:

Among the fundamental characteristics of the Nukak way of life is their organization into small nomadic bands that range in size between six and thirty persons, united by blood ties, affinity or alliance. The bands disperse themselves according to water sources, concentration of vegetable species for fruit gathering, and hunting and fishing sources. There are no class divisions or private property rights; the exchange of goods takes place in the form of reciprocity. The political organization does not entail monolithic legal or governmental structures,[and] misbehavior is controlled according to norms of custom which are set by social sanction and the authority of a chief of the band or traditional leader, recognized by experience, prestige or age.

Myth, ritual, chant/song, music, dance, painting, shamanism and traditional medicine are expressions of the spiritual world. The instruments and techniques of hunting and fishing, pottery, weaving, construction of temporary shelter and tools, are part of the technological and material invention that allows them to obtain what is necessary for equilibrium, survival and regeneration. The population,

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33. See CONSTITUCIÓN POLÍTICA DE COLOMBIA art. 24 (Colom.).

34. See *id.* art. 13.

35. See *id.* art. 19.

36. Constitutional Court Decision No. T-342 (1994).



## 576 BRIGHAM YOUNG UNIVERSITY LAW REVIEW [1999]

estimated by the informants of the region, entities and missionaries, is estimated to be between 700 and 1000 individuals, but the number of bands, their distribution within the territory, and other details about their way of life and health condition are unknown.

The Association of New Tribes of Colombia has been carrying out an intensive labor for almost fifteen years . . . In "Laguna Pabón," the center of the Nukak-Maku territory, they have established an airplane landing strip and permanent homes. From there they developed programs for health, education, language, ethnography, and religious proselytizing. By donating tools, food, and medical supplies, they generate dependence and settling of groups in the area, creating a situation of social impact and over exploitation of natural resources. In "Laguna Pabón," bands settle for unusual amounts of time, even though in normal travel they would avoid the area due to territorialism, affinity or alliance. The consequences are measured by the relaxing of the protocol interrelations, exchanges, and territorial occupation; the depletion of natural resources, concerning the risk of getting diseases from other segments of the group, and a dynamic growing dependence on missionaries.<sup>37</sup>

The Association of New Tribes of Colombia answered in regard to the sedentarization of the "Nukak-Maku" that

due to the difficulties in promoting the labor of religious conversion of the Nukak, the missionaries develop the strategy of gradually instigating centralization and settling of the group through the adoption of stationary gardens. They encourage sowing and harvesting by making donations of plantain, corn and yucca seeds, as well as of tools, in exchange for personal services ranging from the maintenance of gardens to the linguistic collaboration to learn the language.<sup>38</sup>

The agents of the tribe further argued that the Association of New Tribes

exercises an unconstitutional "religious proselytizing" scheme; in the written demand they claim, "In regards to the missionaries, the manner in which they facilitate the assimilation of evangelism by the indigenous people is by comprehending abstract levels of thought after a profound

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37. *Id.*

38. *Id.*

study of the native language. With this argument they try to create a non-traumatic assembling between their dogma and the Nukak cosmogony, and to guarantee the harmony between the two thoughts without loss of the cultural values they are intervening.

For evangelical missionaries, mythology, ritual, dance, the use of psycho-tropic substances and our medical traditions are considered pagan and sinful. The notion of evil is introduced with the figure of a punishing God. Heaven and hell are categories used as leverage to recklessly get indigenous peoples to gradually deny their customs and eventually develop a feeling of embarrassment and repugnance for their history.<sup>39</sup>

The Constitutional Court considered viable the tutelage action against the Association, concluding that the indigenous community of Nukak-Maku was defenseless. The Court emphasized that this vulnerability was a result of the community's lack of physical and judicial conditions necessary to neutralize the activities of the Association; instead, relationships of dependence were developed through the various actions protected by the state that the Association executed in the womb of the community, for the purpose of achieving the Nukak-Makus' acculturation.<sup>40</sup>

The Court also stated that the recognition of ethnic and cultural diversity of the indigenous population is harmonious with the different precepts of the National Constitution in regards to the conservation, preservation, and restoration of natural resources.<sup>41</sup> If indigenous communities constitute a natural human resource that is considered integral to the environment, they are even more valuable when they occupy territories with ecosystems of exceptional characteristics and ecological value, which must be conserved as an integral part of the natural and cultural patrimony of the nation. In this manner, the indigenous population and the natural setting constitute one system or universe deserving of protection from the state. The recognition of the aforementioned diversity obviously implies that within the comprehensive universe, fundamental rights of indigenous communities need to be

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39. *Id.*

40. *See id.*

41. *See id.*

## 578 BRIGHAM YOUNG UNIVERSITY LAW REVIEW [1999

effectively established. Therefore, any action by public authorities or particular citizens that implies a violation or threat to the ethnic and cultural diversity of communities such as the Nukak-Maku may also constitute a transgression or threat to other vulnerable fundamental rights such as equality, liberty, autonomy for the development of personality, health, and education. The Court further affirmed that

the liberty recognized in the Political Constitution to profess

and diffuse a religion, with a corresponding duty not to seek, through force or other illegitimate and censurable means, to religiously or culturally homogenize the different social elements, means that the "Nukak-Maku" community has the right to access and practice any other class of thought or religious cult, which is possible, without that inevitably creating a situation of conflict between the indigenous and foreign culture.<sup>42</sup>

The Constitutional Court concluded that the Association of New Tribes directly threatened the fundamental rights of the Nukak-Maku to liberty, free development of personality, liberty of conscience and cults, and, principally, their cultural rights. As an ethnic body with singular characteristics, the Nukak-Maku possess cultural rights that are fundamental in that they constitute a pillar of social cohesion.<sup>43</sup>

The Court conceded to the indigenous community of Nukak-Maku the protection of their fundamental rights. To that end, it ordered the General Division of Indigenous Affairs of the Ministry of Government to ensure that the activities of the Association of New Tribes of Colombia were appropriate to meet the Court's social objectives. More specially, the Court charged the Division with ensuring that the labor of inspection and vigilance be carried out in an efficient and opportune manner, according to its legal powers, to ensure that the operations of the Association be realized within the legal framework. It would not tolerate official dependence; therefore, if the Association refused to comply, the Division was ordered to apply the extreme measure of canceling its judicial character.

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42. *Id.*

43. *See id.*

## V. CONCLUSION

The establishment of a catalog of fundamental individual rights in the Political Constitution of Colombia of 1991, along with the recognition of ethnic and cultural plurality as a fundamental principle, undoubtedly produces a constitutional tension. As the Constitutional Court has stated:

There exists a tension between the constitutional recognition of ethnic and cultural diversity and the establishment of fundamental rights. While these are philosophically founded in transcultural norms, allegedly universal, which would permit a firm base for living together with others and peace among nations, respect for diversity assumes the acceptance of diverse visions and value standards, even those contrary to those of a universal ethic. This paradox has given rise to a heated philosophical debate about the effect of human rights confirmed in international treaties. The full application of fundamental constitutional rights in indigenous territories as a limit on the principle of ethnic and constitutional diversity is accepted at the international level, particularly if it deals with human rights as a universal code of dialogue and cohabitation between cultures and nations required for peace, justice, liberty, and the posterity of all peoples.<sup>44</sup>

In the search for a solution to this tension, the Colombian Constitution does not adopt either a universal extreme or an unconditional cultural relativism. On the contrary, it promotes respect for the values of the distinct indigenous peoples. Otherwise, it would hamper the effectiveness of the pluralism inspired by its text.

In other words, the right to ethnic and cultural diversity, and its development—the exercise of jurisdiction by the authorities of indigenous peoples—may only be limited by the defense of the right to life and personal integrity. However, we must keep in mind that if fundamental rights operate to limit the principle of ethnic and cultural diversity, then the exercise of these rights, as in the case of religious liberty, must also be harmonized with the preservation of ethnic and cultural identity.

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44. *Id.*

## 580 BRIGHAM YOUNG UNIVERSITY LAW REVIEW [1999]

In the event of conflict between the rights of religious liberty and ethnic and cultural pluralism, we must consult the jurisprudence of the Constitutional Court about the fundamental core of rights and the harmonization between the two fundamental rights. As for specific cases, more protection has been given to ethnic and cultural diversity. Religious liberty has prevailed only when it has been in harmony with the cultural values of the indigenous community and has respected the integrity of social, political, and cultural forms.